

# BURDENS OF PROOF†

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THE term "burden of proof" is used in our law to refer to two separate and quite different concepts. The distinction was not clearly perceived until it was pointed out by James Bradley Thayer in 1898.<sup>1</sup> The decisions before that time and many later ones are hopelessly confused in reasoning about the problem.<sup>2</sup> The two distinct concepts may be referred to as (1) the risk of non-persuasion, or the burden of persuasion or simply persuasion burden; (2) the duty of producing evidence, the burden of going forward with the evidence, or simply the production burden or the burden of evidence.<sup>3</sup>

## RISK OF NON-PERSUASION OR PERSUASION BURDEN

Burden of proof often means what Wigmore has called the risk of non-persuasion.<sup>4</sup> Wherever in human affairs a question of the existence or non-existence of a fact is to be decided by somebody, there is the possibility that the decider, or trier of the fact, may at the end of his deliberations be in doubt on the question submitted to him. On all the material before him, he may, for example, regard the existence or non-existence of the fact as equally likely—a matter in equipoise. If, now, the trier is operating under a system which requires him to decide the question one way or the other, then to avoid caprice that system must furnish him with a rule for deciding the question when he finds his mind in this kind of doubt or equipoise. Where the parties to a civil action are in dispute over a material issue of fact, then that party who will lose if the trier's mind is in equipoise may be said to bear the risk

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1. THAYER, A PRELIMINARY TREATISE ON EVIDENCE AT THE COMMON LAW 355-64 (1898) [hereinafter cited as THAYER].

2. See generally McNaughton, *Burden of Production of Evidence: A Function of a Burden of Persuasion*, 68 HARV. L. REV. 1382 (1955).

3. See MORGAN, SOME PROBLEMS OF PROOF UNDER THE ANGLO-AMERICAN SYSTEM OF LITIGATION 72-73 (1956) [hereinafter cited as MORGAN].

4. 9 WIGMORE, EVIDENCE § 2485 (3d ed. 1940) [hereinafter cited as WIGMORE].

that the trier will not be affirmatively persuaded or the risk of non-persuasion upon that issue.<sup>5</sup>

What Wigmore has called the risk of non-persuasion is more often called the burden of persuasion or the persuasion burden.<sup>6</sup> Under our system which frees the judge and jury of responsibility for investigating<sup>7</sup> and presenting facts and arguments, placing that responsibility entirely upon the respective parties, the more common phraseology is apt enough. The risk may well be viewed as a burden which the party may take affirmative and dynamic steps to bear. It should be noted, however, that even under a system where the trier of fact had the job of investigating the facts without help or argument from the parties there would still be the possibility of doubt or equipoise when the time for decision came. A concept of the risk of non-persuasion seems to be inseparable from any system wherein issues of fact are to be decided on any rational basis by human beings.

Many civil cases are tried by a court without a jury; in them the judge acts as trier of fact as well as law. As trier of fact he may be faced with the problem of doubt or equipoise upon one or more issues. Where that is the case the judge must meet and resolve the problem and he does so under our system by applying the same guides or tests as would be laid down for a jury if it were deciding the issue.<sup>8</sup>

Where an issue of fact is tried to a jury, it is the members of the jury whose minds may be in doubt or equipoise and the judge is not directly concerned in solving the problem. Under our system, however, the court does not leave this problem entirely to the jury, but attempts to formulate guides or tests for them in its charge.<sup>9</sup> Moreover courts have devised different tests or measures of persuasion to be applied to different types of cases or issues. All this has meant:

(1) The court *allocates* the persuasion burden on each issue and thereby "decides each issue of fact which the jury is unable to decide";<sup>10</sup> that is he tells them what to do in case they cannot decide it.

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5. MORGAN 74.

6. See MORGAN 72-73.

7. MORGAN 71-72; Michael & Adler, *Real Proof*, 5 VAND. L. REV. 344 (1952).

8. See, e.g., *Preferred Acc. Ins. Co. v. Grasso*, 186 F.2d 987 (2d Cir. 1951); *Lecates v. Lecates*, 38 Del. 190, 190 Atl. 294 (1937).

9. "[T]he most important part of the judge's charge relative to the facts—i.e. that of dealing with the burden of proof—ought to be so worded that the jurors can comprehend it." *Larson v. Jo Ann Cab Corp.*, 209 F.2d 929, 935 (2d Cir. 1954).

10. MORGAN 71.

(2) The court has tried to retain a measure of control over the jury's mental processes by describing for them the required measure of persuasion.

(3) To do so courts have had to formulate expressly these measures and tests and this had led to refinements—often overrefinements—of language, and to many reversals that might have been avoided had the court, as trier, applied the test without the need for making it articulate.<sup>11</sup>

The usual formulation of the test in civil cases is that there must be a *preponderance of evidence* in favor of the party having the persuasion burden (the proponent) before he is entitled to a verdict.<sup>12</sup> An alternative phrase often used is *greater weight* of the evidence. The general statement (in either form or both, coupled in the alternative as “preponderance or greater weight of the evidence”) is usually explained as referring not to the number of witnesses or quantity of evidence but to the convincing force of the evidence.<sup>13</sup>

This common form of statement has been criticized as calling for an objective appraisal of the evidence rather than a subjective appraisal of its persuasive effect on the mind of the trier.<sup>14</sup> As a perceptive writer pointed out, “perception of the preponderance of evidence is quite consistent with want of belief.”<sup>15</sup>

All would agree that what counts is the jury's belief in the existence (or non-existence) of the disputed fact, and the extent to which the evidence actually produces that belief; surely we are not seeking the jury's estimate of the weight of evidence in the abstract, apart from its power actually to convince or persuade them.<sup>16</sup> Moreover it is doubtful

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11. A judge may of course feel the need to articulate the test with analytical detail in his finding or memorandum of decision, but this rarely happens.

It may be urged that the lack of formulation may sometimes conceal error, so that the need for formulation would be a good thing. But oftener, I suggest, it is better to apply a common sense test without articulation than to have to frame the test in language which will satisfy appellate courts. The gist of the concept is not so hard to grasp and apply practically in most cases that the law should insist on its being carefully thought through every time it is used.

12. See MAGUIRE, EVIDENCE COMMON SENSE & COMMON LAW 180 (1947) [hereinafter cited as MAGUIRE]. See also Annot., 147 A.L.R. 380 (1943) (examples of jury charges).

13. MORGAN 83.

14. MAGUIRE 180.

15. 9 WIGMORE § 2498, at 327, quoting Professor William Trickett. “To detect a preponderance of evidence that *B* signed a note, is neither to believe that he signed it, nor to be logically required to believe that he signed it.” *Ibid*.

16. MORGAN 84-85.

whether such abstract weighing can be done (except quantitatively as by counting noses). For these reasons a more meaningful and accurate statement would require the jury to believe that the existence of a fact is more probable than its nonexistence before they may find in favor of the party who has the burden to persuade the trier of the fact's existence.<sup>17</sup> Some courts accept this formulation of the test;<sup>18</sup> others have balked at it.<sup>19</sup>

Most if not all courts accept the usual formulation of the test,<sup>20</sup> and it is probably unlikely in fact to mislead a jury into making the difficult and abstract evaluations which the language literally invites. Indeed that meaning of the words used in describing the preponderance of evidence test would probably never occur to the average jurymen, whose tendency will always be to interpret the charge in a personal and subjective way—in terms of his own feelings and experiences.

Another quite different question is whether the preponderance of evidence test (however phrased) is to be applied to all types of civil actions and to all issues in them.<sup>21</sup> A much stronger degree of conviction or belief is, of course, required in criminal cases. There the burden is to show the guilt of the accused beyond a reasonable doubt.<sup>22</sup> Such a test is scarcely ever applied to issues in civil actions. Yet courts have devised an intermediate test which is occasionally applied in civil controversies. This calls for "clear and convincing evidence" or evidence which is "clear, precise and indubitable," before the proponent's persuasion burden is met.<sup>23</sup> These formulations show the same confusion as that

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17. See generally Morgan, *Instructing the Jury Upon Presumptions and Burden of Proof*, 47 HARV. L. REV. 59, 66 (1933).

18. See, e.g., *Sargent v. Massachusetts Acc. Co.*, 307 Mass. 246, 29 N.E.2d 825 (1940); *Sullivan v. Nesbit*, 97 Conn. 474, 117 Atl. 502 (1922).

19. See *Lampe v. Franklin Am. Trust Co.*, 339 Mo. 361, 384, 96 S.W.2d 710, 723 (1936).

20. See Annot., 147 A.L.R. 380 (1943).

21. See MAGUIRE 179.

22. This rule is frequently codified. See, e.g., CAL. PEN. CODE § 1096; IND. ANN. STAT. § 9-1806 (1956). See generally McBaine, *Burden of Belief*, 32 CALIF. L. REV. 242 (1944).

23. *Beeler v. American Trust Co.*, 24 Cal. 2d 1, 147 P.2d 583 (1944) (whether deed intended as mortgage); *Clark v. Diefendorf*, 109 Conn. 507, 147 Atl. 33 (1929) (claim against decedent's estate not presented to her during her lifetime); *Johnson v. Johnson*, 172 N.C. 530, 90 S.E. 516 (1916) (to have written deed corrected because of mutual mistake of parties). See also *United States v. American Bell Tel. Co.*, 167 U.S. 224, 262 (1897) (to avoid a patent for fraud; evidence must be "clear, convincing and satisfactory"); *Bukowski v. United States*, 136 F. Supp. 91, 95 (S.D. Tex. 1955)

noted above between an objective measurement of the weight of proof and its persuasive effect on the mind of the trier. But they probably suffice to put the jury more in a frame of mind to resist persuasion than does the usual test, and it is doubtful whether anything more can be done where a difference in degree is sought in dealing with factors so subjective and imponderable.

#### BURDEN OF PRODUCING EVIDENCE

The second meaning which is commonly given to the term burden of proof refers to the burden of going forward with, or of producing evidence. This is sometimes called the burden of evidence or the production burden. Here again, as with the persuasion burden, a more accurate term might be the risk of non-production, but this expression is not in general use.

A definition of the term is not so important as a description of the function and operation of the concept it embodies. Moreover the definition will be easier to understand in such a context, so the attempt to frame it will be postponed.

The production burden first comes into play at the very beginning of the trial.<sup>24</sup> We have seen that the judge and jury do not have the responsibility of investigating cases or furnishing the evidence upon which they are to be decided. Our system leaves it to the parties to do those things. If, now, neither party offers any evidence at the trial, what will happen? The answer is that one party loses. He may, therefore, be said to bear the risk of this consequence of non-production of evidence.<sup>25</sup> Or, as we more often say, he bears the burden of producing at least some evidence.

The next question is: how much evidence need the original proponent produce to lift this burden?<sup>26</sup> The answer may be divided into two parts: (a) The proponent must introduce sufficient evidence to justify a verdict in his favor, (b) on each of the propositions of fact which he must establish as part of his case.<sup>27</sup> This answer does not get us very

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(where income tax penalties are sought, fraud must be established by "clear and convincing proof"); 9 WIGMORE § 2498.

24. See THAYER 376.

25. See THAYER 357, 376. See also 9 WIGMORE §§ 2487-88.

26. See diagram in 9 WIGMORE § 2487. See generally McNaughton, *supra* note 2, at 1384-85.

27. See *Thoe v. Chicago M. & St. P.R.R.*, 181 Wis. 456, 195 N.W. 407 (1923); MORGAN 73.

far; it simply invites further inquiry and refers us to the concept of sufficiency of the evidence and the test for determining what propositions of fact constitute essential elements of the proponent's case rather than the case of his adversary—that is the tests for allocating the production burden on each issue of fact in the case. These tests are discussed later in this article; the concept of sufficiency of the evidence will be treated in a later article.<sup>28</sup>

We have seen that the consequence of failure to produce evidence—or sufficient evidence—is loss of the case. This loss is brought about by means of the procedural device of nonsuit, directed verdict, or dismissal.<sup>29</sup> Each of these is an order made by the court either on motion of a party or on its own motion after the proponent has rested his case, *i.e.* has indicated that he has put in all the evidence upon the issue which he intends to—which may of course be no evidence at all.

Since it is the judge who passes upon such motions, it is the judge who determines questions of the sufficiency of evidence and who allocates the production burden on each issue.<sup>30</sup> Thus these concepts may be viewed as part of the apparatus for controlling the jury.<sup>31</sup> The court screens all cases initially to see whether they will even go to the jury.<sup>32</sup>

We may next consider the consequences of the proponent's meeting, or lifting, the production burden. In the first place the proponent thereby escapes a nonsuit, directed verdict, or dismissal when he rests his case. But is he entitled to more, for example, a directed verdict in his favor? He will not be, of course, if the opponent puts in controverting evidence as he usually does. But what if the opponent also rests his case at this point without putting in any evidence? Even then the proponent is not generally entitled to a directed verdict; the opponent is entitled to have the jury pass on the proponent's evidence.<sup>33</sup> Testimony, even

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28. To be published in the March, 1961 issue of *Virginia Law Review*.

29. *Thoe v. Chicago M. & St. P.R.R.*, *supra* note 28; 9 WIGMORE § 2495.

30. See MAGUIRE 175-76; 9 WIGMORE § 2495.

31. 9 WIGMORE § 2487. See also 2 HARPER & JAMES, *TORTS* §§ 15.1-5, 17.1-6, 19.11 (1956); THAYER 183-262; James, *Functions of Judge and Jury in Negligence Cases*, 58 YALE L.J. 667 (1949).

32. MAGUIRE 175.

33. See, *e.g.*, *Sweeney v. Erving*, 228 U.S. 233, 240 (1913); *Terwilliger v. Marion*, 222 S.C. 185, 72 S.E.2d 165 (1952); *George Foltis, Inc. v. City of New York*, 287 N.Y. 108, 119-23, 38 N.E.2d 455, 459-63 (1941); *Texas Employers' Ins. Ass'n v. Roberts*, 135 Tex. 123, 139 S.W.2d 80 (1940) (plaintiff not entitled to favorable finding as matter of law on issue upon which he gave uncontradicted testimony—jury may disbelieve him); *cf.* *Hughes v. Aetna Ins. Co.*, 261 S.W.2d 942 (Mo. 1953) (affirmative defense supported by uncontradicted testimony for jury).

if uncontradicted, usually raises questions of credibility (*i.e.*, honesty, bias, accuracy of observation, memory, expression and the like).<sup>34</sup> Circumstantial evidence usually permits more than one possible inference.<sup>35</sup> Admitted conduct may often be evaluated differently (as reasonable, negligent, or the like) by different persons.<sup>36</sup> All of these matters are properly for the jury. When the evidence upon an issue is in such state that it is for the jury, then neither party has the production burden on that issue, although of course the opponent is free to put his evidence before the trier of fact.

So much for the usual case. It will sometimes happen, however, that the proponent's evidence leaves open no question of credibility, of evaluation of conduct, or of choice among competing inferences, about which reasonable minds might differ. In such a case the court will direct the verdict in favor of the proponent *unless* the opponent offers evidence to controvert or avoid the effect of the proponent's evidence.<sup>37</sup> At this point the production burden rests on the party who was originally the opponent. The original opponent then may meet this burden by offering evidence which either (a) presents a question for the jury, so that the production burden rests on neither party, or (b) is of such compelling force as to shift the production burden back again to the party who bore it at the outset—the original proponent.

From the above, the following appears:

(1) The concept of the production burden is addressed to the court's function, not the jury's. It is simply a device whereby the court determines whether, if the trial were stopped at any given point, it would send the case to the jury. If not, the court decides the case and the jury has no role to play. If the case is sent to the jury, the production burden drops out of the case and has no role to play.<sup>38</sup> The jury will be concerned only with the persuasion burden.<sup>39</sup>

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34. See, *e.g.*, *Wyatt v. Moran*, 81 R.I. 399, 103 A.2d 801 (1954) (trial court need not accept uncontradicted evidence showing gift *inter vivos*); *Tervilliger v. Marion*, *supra* note 33; *MacDonald v. Pennsylvania R.R.*, 348 Pa. 558, 36 A.2d 492 (1944) (defendant's uncontradicted evidence exculpating its employees for derailment presents issue for jury).

35. See *Mahan v. Able*, 251 S.W.2d 994, 997 (Ky. 1952); *George Foltis, Inc. v. City of New York*, 287 N.Y. 108, 119-23, 38 N.E.2d 455, 459-63 (1941).

36. See *Sams v. Albers Super Mkts., Inc.*, 86 Ohio App. 167, 89 N.E.2d 101 (1949); 2 HARPER & JAMES, *TORTS* §§ 15.3, 16.10, 17.1 (1956); *James*, *supra* note 31, at 676-79.

37. MAGUIRE 175-76; 9 WIGMORE § 248.7.

38. 9 WIGMORE § 248.7.

39. MORGAN 73; 9 WIGMORE § 248.7.

(2) The question of allocation of the production burden arises at the very beginning of the trial and at various points thereafter. And while this burden rests on one party at the beginning, it may shift to his opponent, and then shift back again.<sup>40</sup>

(3) The concept has primarily a procedural consequence when evidence is available to both parties on the issue in question; it simply determines the order in which they shall put it in. Where, however, no evidence is available to a party on an issue, then the allocation to him of the production burden will mean that he loses upon that issue, and often upon the whole case. Thus in an action for wrongful death caused by negligence where there is no evidence, direct or circumstantial, of the decedent's own conduct leading up to his death, plaintiff cannot recover under a system which allocates to him the production burden on the issue of contributory negligence.<sup>41</sup>

(4) The concept of a production burden will be fully applicable in cases tried to a judge without a jury, although the jury trial has probably pointed up and dramatized its importance. Under a system in which the tribunal itself or some other agency of society had the responsibility for acquiring the materials for decision on its own initiative, however, there would be no need to allocate the production burden to one of the parties.

#### THE BASES FOR ALLOCATING THE BURDENS OF PROOF

There is no satisfactory test for allocating the burden of proof in either sense on any given issue.<sup>42</sup> The allocation is made on the basis of one or more of several variable factors. Before considering these, however, we should note three formal tests which have some currency but are not very helpful.<sup>43</sup>

(1) It is often said that the party who must establish the affirmative proposition has the burden of proof on the issue.<sup>44</sup> But language can be manipulated so as to state most propositions either negatively or affirma-

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40. See, e.g., *Smith v. Hill*, 232 Mass. 188, 122 N.E. 310 (1919), *aff'd*, 260 U.S. 592 (1923).

41. *Korler v. Lalley*, 112 Conn. 86, 151 Atl. 433 (1930).

42. "Where the burden of proof should rest is merely a question of policy and fairness, based on experience in the different situations." *Rustad v. Great No. Ry.*, 122 Minn. 453, 456, 142 N.W. 727, 728 (1913), *quoting* 9 WIGMORE § 2486, at 275.

43. Compare MAGUIRE 179.

44. *First Nat'l Bank v. Ford*, 30 Wyo. 110, 118, 216 Pac. 691, 693 (1923); 1 GREEN-LEAF, EVIDENCE § 74 (16th ed. 1899); MORGAN 75; THAYER 370, 485; 9 WIGMORE § 2486.



tively. Breach of a promise may be call non-fulfillment. Negligence is often described as the lack of or failure to exercise due care. An action in which plaintiff seeks a declaration of non-liability is just as truly one seeking a declaration that good defenses exist to the claim asserted by the defendant.<sup>45</sup>

(2) It is sometimes said that the burden of proof is upon the party to whose case the fact in question is essential, and so it is,<sup>46</sup> but this test simply poses another question: to which party's case is the fact essential? And the second question is no easier to answer than the first; indeed it is but a restatement of the same question.

(3) It is often said that the party who has the burden of pleading a fact must prove it.<sup>47</sup> This is in large part true and where there is clear authority on the pleading rule this is a fairly good, though not infallible, indication that the rule of burden of proof will parallel it. Three things should, however, be noted. The burden of proof does not follow the burden of pleading in all cases.<sup>48</sup> Many jurisdictions for example require a plaintiff to plead non-payment of an obligation sued upon but do not require him to prove it.<sup>49</sup> In federal courts defendant must plead contributory negligence as an affirmative defense to an action for injuries negligently caused, but federal courts in diversity of citizenship cases will follow a local rule which puts on plaintiff the burden of proving his freedom from contributory negligence.<sup>50</sup> The second difficulty with the suggested test is that there is often no clear authority

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45. Compare *Preferred Acc. Ins. Co. v. Grasso*, 186 F.2d 987 (2d Cir. 1951) (burden of proof in declaratory judgment action on insured defendant), and *State Farm Mut. Auto. Ins. Co. v. Smith*, 48 F. Supp. 570 (W.D. Mo. 1942) (defendant has burden of proof of showing liability), with *American Indem. Co. v. Davis*, 155 F. Supp. 47 (M.D. Ga. 1957), modified, 260 F.2d 440 (2d Cir. 1958) (plaintiff insurer has burden of proof of breach of cooperation clause), and *Travelers Ins. Co. v. Drumheller*, 25 F. Supp. 606 (W.D. Mo. 1938) (burden on plaintiff to prove insured did not die as result of accident). See generally Note, *Developments in the Law—Declaratory Judgments—1941-1949*, 62 HARV. L. REV. 787, 836 (1949).

46. MORGAN 75; THAYER 371 & n.2; 9 WIGMORE § 2486.

47. MORGAN 75. See also CLARK, *CASES ON MODERN PLEADING* 628 (1952); CLARK, *CODE PLEADING* 607 (2d ed. 1947).

48. See THAYER 366-67.

49. See *Thomas v. Tygart*, 177 Ark. 1195, 6 S.W.2d 827 (1928); Alden, *The Defense of Payment Under Code Procedure*, 19 YALE L.J. 647 (1910); Reppy, *The Anomaly of Payment as an Affirmative Defense*, 10 CORNELL L.Q. 269 (1925). But cf. *Conkling v. Weatherwax*, 181 N.Y. 258, 73 N.E. 1028 (1905) (action to enforce legacy as lien on realty is not based on instrument for payment of money, so burden of proving nonpayment is on plaintiff).

50. *Palmer v. Hoffman*, 318 U.S. 109, 117 (1943).

upon the pleading rule. The burden of pleading is itself allocated on the basis of pragmatic considerations of fairness, convenience, and policy, rather than on any general principle of pleading.<sup>51</sup> Since the burden of proof is allocated on very much the same basis, a similar inquiry must be made to determine the pleading rule (where there is no clear authority) as would suffice to answer the burden of proof rule in the first instance. This fact, incidentally, suggests why burden of pleading and burden of proof are usually parallel; they are both manifestations of the same or similar considerations.<sup>52</sup> A third difficulty with the proposed rule is that under modern systems, pleadings are cut off with the answer<sup>53</sup> so that issues often have to be tried that do not appear in the pleadings at all.

Another rule for allocating the burden of proof would put it on the party having the readier access to knowledge about the fact in question.<sup>54</sup> This, it will be noted, is not merely a formal rule. It refers rather to one of the considerations which should and do in fact influence the allocation of the burden of proof.<sup>55</sup> But it is not the only consideration and it is by no means always controlling. It is an everyday occurrence in litigation that a party has the burden to prove what his opponent's conduct was. Examples are negligence, contributory negligence, and breach of contract, in many common situations. In these instances the consideration arising from greater access to evidence is overcome by a feeling that a charge of wrongdoing should in fairness be proven by the party making it.

Another factor to be considered is the extent to which a party's contention departs from what would be expected in the light of ordinary human experience. It is a matter of convenience to assume that things

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51. See CLARK, *CASES ON MODERN PLEADING* 610 (1952).

52. It also shows why they are not always parallel. In suing on an insurance policy for example, many states allow a plaintiff to allege compendiously that he has performed all conditions precedent (these being many). See *Rochon v. Preferred Acc. Ins. Co.*, 118 Conn. 190, 171 Atl. 429 (1934). Defendant must then plead specifically the nonfulfillment of any conditions which it will rely on. But plaintiff has the burden of proving fulfillment of any conditions thus specifically set out in the defendant's pleadings. The pleading rule here serves a consideration of convenience, namely the avoidance of pleading at length the performance of manifold conditions as to most of which there will probably be no issue. But this consideration is fully satisfied at the pleading stage and has no place among those which should determine burden of proof.

53. See, e.g., FED. R. CIV. P. 7(a); N.Y. CIV. PRAC. ACT §§ 260, 272, 274.

54. MAGUIRE 179; MORGAN 75 n.98; 9 WIGMORE § 2486.

55. 2 HARPER & JAMES, *TORTS* § 19.9 (1956).

occurred as they usually do and to make the party who asserts the uncommon occurrence prove that it did happen as he claims. Thus where services are performed for another in an ordinary business or professional context, it is unlikely that they were understood to be gratuitous. It is not surprising, therefore, to find that the burden of proving such an understanding is on the one who claims it.<sup>56</sup> By way of contrast, where services are performed for other members of the immediate family, living together, the likelihood of an agreement to pay for them is not so great and must be proved by him who claims the right to be paid.<sup>57</sup>

Substantive considerations may also be influential. For real or supposed reasons of policy the law sometimes disfavors claims and defenses which it nevertheless allows. Where that is the case procedural devices like burden of proof are often used as handicaps, to use Judge Clark's felicitous phrase, against the disfavored contention.<sup>58</sup> Thus whoever charges his adversary with fraud, be he plaintiff or defendant, must prove it.<sup>59</sup> And although falsity is often included in the definitions of defamatory statements, yet the defendant in libel or slander must plead and prove the truth of the objectionable words if he would use that as a defense.<sup>60</sup> In many of the older states, plaintiff, in a negligence action, had to prove his own due care, but as the defense of contributory negligence became increasingly unpopular with courts and legislatures, the tendency has been increasingly to make defendants plead and prove it.

The degree of persuasion required is also sometimes manipulated as a handicap against disfavored contentions. Thus if a claim is presented against a decedent's estate which was never presented to the decedent himself during his lifetime, some courts require the claim to be proven by clear and convincing evidence.<sup>61</sup>

Except for the last paragraph, no distinction has so far been made

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56. See *In re Smith's Estate*, 202 Okla. 302, 213 P.2d 284 (1949); *Hartley v. Bohrer*, 52 Idaho 72, 11 P.2d 616 (1932); *Scott v. Morse*, 54 Iowa 732, 6 N.W. 68 (1880).

57. See *Johnson v. Johnson*, 99 N.H. 392, 111 A.2d 820 (1955) (claim allowed where agreement to pay affirmatively proven); *In re Fox's Estate*, 131 W. Va. 429, 48 S.E.2d 1 (1948) (agreement to pay not proven); cf. Annot., 7 A.L.R.2d 8 (1949); Annot., 36 A.L.R. 677 (1925).

58. CLARK, CODE PLEADING 609-10 (2d ed. 1947).

59. *Ibid.*

60. *Ibid.*

61. See *Clark v. Diefendorf*, 109 Conn. 507, 147 Atl. 33 (1929); *Badover v. Guaranty Trust & Sav. Bank*, 186 Cal. 775, 200 Pac. 638 (1921).

in this section between the two kinds of burden of proof. That is because the kind of factors we have been treating are considered in allocating either kind of burden. When we deal with a specific allocation and the time for making it, however, we must differentiate. We have seen that the question of production burden comes up at the very beginning of the trial and thereafter when both parties rest their case; and we have also seen that the burden may shift. This means that the balance of considerations relevant to allocating this burden may be struck several times during the course of a trial. And considerations which are relevant at one time, on the then state of the evidence, may become irrelevant or may be outweighed at a later point in the trial.

The orthodox notion, emanating from Thayer, was that the persuasion burden never shifted from its original allocation.<sup>62</sup> This would mean that the persuasion burden does not accompany the production burden which may shift, although generally the persuasion burden is on the party who bore the production burden at the beginning of the trial. Even this last statement is not always true. It may well be considered fair, for instance, that the government should bear the burden of persuading the jury that an accused was sane when he did the act charged as a crime, yet considerations of convenience may dictate a rule compelling the accused to offer evidence of insanity before the defense will be submitted to the jury at all.<sup>63</sup>

Thayer was clearly right in pointing out that the production burden and the persuasion burden did not always march hand in hand.<sup>64</sup> Considerations which may be proper in determining the order of proof may deserve less weight, or none, in determining how the jury is to be guided in its ultimate deliberations. Administrative convenience, for example, would generally be more important where order of proof is all that is at stake, and rules of thumb which serve such convenience may be justified in this context while they would be arbitrary in the other.

It is by no means equally clear, however, that the persuasion burden should never shift. Surely there is no inherent reason why the original allocation should not be reconsidered when the case finally goes to the jury, on all the factors which are seen to be relevant at *that* time. Moreover, as Morgan points out, there is no need to make any allocation

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62. THAYER 370, 378.

63. See *Davis v. United States*, 160 U.S. 469, 485-87 (1895).

64. See THAYER 370-78.

of the persuasion burden at the beginning of the trial or at any other time unless and until the production burden on every dispositive issue is out of the case and the issues are submitted to the jury,<sup>65</sup> so that all talk of shifting the persuasion burden is beside the point. And surely the considerations relevant at the time of final submission should determine how the persuasion burden is to be placed, and not those which appeared to be relevant at an earlier time if they are different. In spite of the cogency of Morgan's reasoning, Thayer's formulation of the rule is the one most frequently stated.<sup>66</sup>

### PRESUMPTIONS

The word "presumption" is used to mean many different things,<sup>67</sup> but this they all have in common: they involve a relationship between a proven or admitted fact or group of facts, *A*, and another fact or conclusion of fact, *B*, which is sought to be proven.

At one end of the scale is the presumption of law, or conclusive or irrebuttable presumption. If *A* is shown, then *B* is to be presumed without question and the court will not even receive evidence or entertain argument to show the non-existence of *B*. And the court will direct a jury that if they find *A* to be proven they *must* also find *B*. The conclusive presumption is not really a procedural device at all. Rather it is a process of concealing by fiction a change in the substantive law. When the law conclusively presumes the presence of *B* from *A*, this means that the substantive law no longer requires the existence of *B* in cases where *A* is present, although it hesitates as yet to say so forthrightly.<sup>68</sup> We shall not here deal further with conclusive presumptions. Our concern is with those often called rebuttable presumptions of fact.

The word presumption is occasionally used to refer to the logical inference of one fact from the existence of another.<sup>69</sup> The process of judicial proof is constantly calling on circumstantial evidence and the

65. See MORGAN 80.

66. See, e.g., *Cornell v. Cornell*, 57 N.M. 380, 258 P.2d 1143 (1953); 9 WIGMORE § 2489 (burden of proof never shifts).

67. See MORGAN, MAGUIRE & WEINSTEIN, *CASES ON EVIDENCE* 438-39 (4th ed. 1957).

68. See 9 WIGMORE § 2492; Bohlen, *The Effect of Rebuttable Presumptions of Law Upon the Burden of Proof*, 68 U. PA. L. REV. 307, 311-12 (1920). See also *State v. Platt*, 2 S.C. 150, 154 (1870); THAYER 317, 319.

69. See *Amrtorg Trading Corp. v. Higgins*, 150 F.2d 536, 538 n.2 (2d Cir. 1945); *State v. Corby*, 28 N.J. 106, 113-15, 145 A.2d 289, 293-94 (1958) (citing 9 WIGMORE § 2491). See also Bohlen, *supra* note 68, at 310.

inferences which may be drawn from it. If Smith mails at a postbox a letter to Jones, with proper address and postage on the envelope, the trier may infer that Jones received the letter.<sup>70</sup> From long skid marks on a pavement great speed on the part of the vehicle that made them may be inferred.<sup>71</sup> From the blowing of a horn in certain circumstances it may be inferred that a driver then saw a pedestrian.<sup>72</sup> From handwriting similarities identity of authorship of two documents may be inferred.<sup>73</sup> And so on, ad infinitum. As we shall see, courts set limits to the drawing of inferences and will permit juries to draw only those which the courts consider rational. But if a court determines that *B* is a rational inference from *A*, then the trier of fact is free to draw that inference as a matter of general lay reasoning and persuasion without the aid of any special procedural rules pertaining to litigation. Since there are such special rules, since the word "presumption" is often used to refer to them, and since "inference" is the word generally used to refer to the process of drawing conclusions of fact on the basis of general lay reasoning and experience, it serves clarity and avoids confusion to observe this distinction between these two words.<sup>74</sup>

Many careful courts and writers use the word presumption to refer only to a device for allocating the production burden.<sup>75</sup> It operates thus: If *B* is presumed from *A*, then on a showing of *A*, *B must* be assumed by the trier in the absence of evidence of non-*B*. To put it another way, if *A* is shown, then the party who asserts non-*B* has the production burden on the issue of *B vel non*, i.e., *B's* existence or non-existence. The word "presumption" will be used here only in this way.

In some situations, to be sure, *B* may be the only rational inference from *A* (absent further evidence), and we have seen that in all such cases the production burden shifts under rules of general application. But courts and legislatures have created presumptions in cases where

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70. See, e.g., *Hobart-Farrell Plumbing & Heating Co. v. Klayman*, 302 Mass. 508, 19 N.E.2d 805 (1939); *Franklin Life Ins. Co. v. Brantley*, 231 Ala. 554, 165 So. 834 (1936); *Williams v. Northeast Mut. Ins. Ass'n*, 51 S.W.2d 142 (Mo. Ct. App. 1932); 9 WIGMORE § 2519.

71. See *Stubbs v. Allen*, 168 Wash. 156, 10 P.2d 983 (1932); *Akers v. Epperson*, 172 S.W.2d 512 (Tex. Civ. App. 1942); Annot., 23 A.L.R.2d 112, 125 (1952).

72. See *Carney v. Concord St. Ry.*, 72 N.H. 364, 369, 57 Atl. 218, 221 (1903) (trolley bell).

73. See *Flickema v. Henry Kraker Co.*, 252 Mich. 406, 233 N.W. 362 (1930).

74. See MAGUIRE 183; 9 WIGMORE § 2491.

75. See *O'Dea v. Amodeo*, 118 Conn. 58, 170 Atl. 486 (1934); MORGAN 77; 9 WIGMORE §§ 2490-91; Bohlen, *supra* note 68.

either (1) *B* would be a permissible inference from *A*, but not the *only* permissible one,<sup>76</sup> or (2) *B* would not even be a permissible inference from *A*.<sup>77</sup> In such situations a presumption has an artificial procedural force and effect (at the point where proponent rests his case) over and above the logical probative effect of the evidence. In the first situation just described a presumption would call for a directed verdict on the issue of *B vel non*,<sup>78</sup> if the opponent also rests, while, as we have seen, without the presumption the proponent on that issue would be entitled only to have it go to the jury.<sup>79</sup> In the second situation the presumption has a double effect. It protects the proponent from an adverse directed verdict on the issue (or non-suit or dismissal), which he would otherwise suffer for want of sufficient evidence.<sup>80</sup> It also entitles the proponent to a directed verdict in his own favor on the issue, absent any countervailing evidence. Later in this article we shall inquire whether a presumption may have any further, continuing effect after evidence to rebut it has been introduced.

From the above it appears that a presumption may have important consequences. What, then, are the bases upon which courts or legislatures will create presumptions? For the most part they are the same kinds of reasons that influence the allocation of the production burden generally, and these may be summed up as reasons of convenience, fairness, and policy.<sup>81</sup> What is *likely*, for instance, is often presumed. Most men are sane, as the law reckons sanity, and most properly sent letters reach their destination. In the absence of any evidence pointing to an opposite conclusion in the case at hand, it is both convenient and

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76. See, e.g., authorities cited note 70 *supra*. See also *McMillan v. Nelson*, 149 Fla. 334, 5 So. 2d 867 (1942) (that stop sign was erected by proper authority); 9 WIGMORE § 2515 (presumption of ownership from possession).

77. CONN. GEN. STAT. REV. §§ 52-182 to -183 (1958) (presumption of agency between owner and operator of automobile); see *O'Dea v. Amodeo*, 118 Conn. 58, 170 Atl. 486 (1934).

78. See *Sellers v. Qualls*, 206 Md. 58, 110 A.2d 73 (1954); *In re Padjan Estate*, 340 Mich. 277, 65 N.W. 2d 743 (1954); *Ritchie v. Thomas*, 190 Ore. 95, 105, 224 P.2d 543, 547 (1950); MORGAN 76-77.

79. See text accompanying notes 33-36 *supra*.

80. See THAYER 336; cf. *O'Dea v. Amodeo*, 118 Conn. 58, 170 Atl. 486 (1934); MORGAN 77.

81. See MAGUIRE 185-86; text accompanying notes 42-60 *supra*.

fair to assume that *this* testator,<sup>82</sup> or *this* man accused of crime<sup>83</sup> was sane when he made the will or did the act charged as criminal; or that *this* properly mailed letter reached the addressee.<sup>84</sup> If nothing else, these assumptions will save a lot of time and trouble in making ponderous proof in every case of matters which will be controverted in only a small minority of cases.

Access to evidence is often the basis for creating a presumption. When goods are damaged in a bailee's possession, for instance, the bailee can more easily find out what happened to them than the bailor, so it is fair to presume the bailee's negligence as an initial matter and put him to the production of exculpatory evidence if he has any.<sup>85</sup> The owner of an automobile has better means of knowing whether the driver was in his service when it struck the plaintiff than has the plaintiff. In such a case also there is an increasingly strong policy to make an automobile owner pay for the damage it causes even where there is no agency in the legal sense. Fairness and policy therefore combine to justify a presumption of agency from the mere fact of ownership.<sup>86</sup> Here, it may be noted, is a presumption (usually created by statute) in a situation where most courts would not permit an inference.

If there is a presumption operating in proponent's favor when he rests his case two questions then arise: (1) what must the opponent do to lift the production burden then resting upon him, and (2) if the opponent does lift this burden, what if any further effect does the presumption have?

Let us take up the first of these questions. It can be rephrased in terms of the simple symbols we have been using. If from *A* there is a presumption of *B*, and *A* is shown,<sup>87</sup> what must the opponent do to

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82. See, e.g., *Sellers v. Qualls*, 206 Md. 58, 110 A.2d 73 (1954); *In re Padjan Estate*, 340 Mich. 277, 65 N.W.2d 743 (1954); *In re Jamison's Estate*, 41 Cal. 2d 1, 15, 256 P.2d 984, 990 (1953); *In re Davis' Will*, 14 N.J. 166, 101 A.2d 521 (1953); *In re Frank's Will*, 231 N.C. 252, 259, 56 S.E.2d 668, 674 (1949). *But cf.* *Rice v. Henderson*, 140 W. Va. 284, 83 S.E.2d 762 (1954).

83. See *Davis v. United States*, 160 U.S. 469, 485-87 (1895).

84. See authorities cited note 70 *supra*.

85. *Frissell v. John W. Rogers, Inc.*, 141 Conn. 308, 106 A.2d 162 (1954). See also James, *Accident Liability: Some Wartime Developments*, 55 YALE L.J. 365, 392 n.133 (1946); Morgan, *Instructing the Jury Upon Presumption and Burden of Proof*, 47 HARV. L. REV. 59, 79 (1933).

86. See *Cebulak v. Lewis*, 320 Mich. 710, 32 N.W.2d 21 (1948); *O'Dea v. Amodeo*, 118 Conn. 58, 170 Atl. 486 (1934).

87. Of course the evidence tending to show *A* may itself fall short of compelling such a finding. If so it will be a question for the trier to decide whether *A* exists.



escape a compulsory finding of *B*? The answer is that the opponent must introduce evidence which will justify a finding of non-*B*. This requirement has, to use Maguire's terms, both an extensive and an intensive aspect.<sup>88</sup> To satisfy the extensive aspect, the evidence must cover the whole of *B*. Thus a presumption of negligence on the part of charterers of a vessel turned over to them in good condition and sinking while in their control, is not met by a showing of care during *part* of the time it was in their control.<sup>89</sup> Such evidence is not enough to lift the production burden. To satisfy the intensive aspect of the requirement, the evidence must satisfy the qualitative tests of sufficiency of the evidence to show non-*B*.

If, now, the opponent has lifted the production burden by rebutting evidence which satisfies the above standards, what happens to the presumption? The orthodox view, sired by Thayer, has it that the presumption is utterly destroyed and disappears, and this even though the trier disbelieves the countervailing evidence.<sup>90</sup> If, for example, the addressee of a properly mailed letter testifies that he never received it, that testimony would, if believed, justify a finding of non-receipt. It therefore satisfies the test of *sufficiency*—which is not concerned with *credibility*—whether it is believed or not. Under the orthodox view this testimony would, then, *end the presumption* even if everybody in the courtroom was convinced that the testimony was a lie. In the case put, the destruction of the presumption would not, however, compel a finding of non-receipt because a properly addressed letter is so likely to reach its destination that a *rational inference* may be drawn

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The assumption in the text is that the evidence demonstrates *A* beyond doubt. If it presents a jury question, what is said in the text is still applicable to the way a jury will be instructed—i.e., they will be told that if they find *A* to be established (by a preponderance of the evidence) then they *must* also find *B*. In other words the finding of *B* is conditionally compulsory. See MORGAN, MAGUIRE & WEINSTEIN, *op. cit. supra* note 67, at 439.

88. MAGUIRE 184.

89. *Alpine Forwarding Co. v. Pennsylvania R.R.*, 60 F.2d 734 (2d Cir. 1932); MAGUIRE 184; cf. *Frissell v. John W. Rogers, Inc.*, 141 Conn. 308, 106 A.2d 162 (1954) (presumption of bailee's negligence arising from re-delivery of goods in damaged condition, not met by showing they were damaged by fire, without more, since some fires do result from negligence).

90. THAYER 346. See *Southland Life Ins. Co. v. Greenwade*, 138 Tex. 450, 456, 159 S.W.2d 854, 857 (1942); *Gaudreau v. Eclipse Pioneer Div. of Bendix Air Corp.*, 137 N.J.L. 666, 61 A.2d 227. (Ct. Err. & App. 1948); MORGAN 77; 9 WIGMORE § 2491.

that it did so.<sup>91</sup> And while countervailing evidence banishes the artificial procedural effect given by a presumption to the facts proven, *A*, (in this case the mailing of the letter, et cetera), yet it does not destroy the rational probative effect of *A*. In our illustration, if the trier rejects the testimony of non-receipt as false and believes the testimony as to proper mailing, it could and probably would find receipt as an inference from the mailing. On the suppositions here made, this result seems just and proper and the orthodox theory would not prevent it. But there are other situations wherein that view does present serious problems.

Suppose, first, that the mind of the trier in the case just described is in equipoise on all the evidence. If the proponent has the burden of persuading the trier of *B*'s existence, he must lose. Does a presumption of *B*'s existence from proof of *A* have any effect on the persuasion burden? The orthodox doctrine says emphatically not—it declares that the effect of a presumption is entirely spent in shifting the production burden, and it denies that the persuasion burden ever shifts.<sup>92</sup> But why should this necessarily be so? We have seen that the considerations which determine the allocation of the persuasion burden are of the same kind as those which lead to the creation of presumptions.<sup>93</sup> If the developments of a trial bring forth a situation which justifies a presumption in the proponent's favor, might not the same considerations (though not necessarily) be sufficient to call for placing the persuasion burden also on the opponent? Why should a presumption always have the minimum effect prescribed for it by orthodoxy? The reasons that bring it forth will vary from mere administrative convenience, the necessity for getting the ball rolling, so to speak, to very strong policy. Should not the force of a presumption "be tough or tender according to the nature and force of those reasons"?<sup>94</sup> Some courts say frankly that it should; and that a presumption may sometimes shift the persuasion burden;<sup>95</sup> but on this particular point the

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91. See *Southland Life Ins. Co. v. Greenwade*, *supra* note 90, at 456-57, 159 S.W.2d at 857-58; 9 WIGMORE §§ 2491(1), 2519.

92. THAYER 370, 378; 9 WIGMORE § 2489.

93. See text accompanying note 81 *supra*.

94. MAGUIRE 185.

95. *Page v. Phelps*, 108 Conn. 572, 143 Atl. 890 (1928); *Morgan*, *supra* note 85, at 62; see MAGUIRE 187; *cf. Burr v. Sherwin Williams Co.*, 42 Cal. 2d 682, 268 P.2d 1041 (1954) (*res ipsa loquitur* said to raise inference rather than presumption, but shifts persuasion burden to defendant) *James, Proof of the Breach in Negligence Cases (In-*

weight of authority is probably that it may not.<sup>96</sup> This problem is of importance, but only in cases where the trier's mind is in equipoise at the end of its deliberations, a situation which probably does not occur very often.

There is another situation where the orthodox theory gives more trouble. As we have seen the fact(s), *A*, which give rise to a presumption of *B* in many instances are not sufficient to warrant an *inference* of *B*. A familiar example is the fairly common presumption of agency from the fact of ownership of an automobile. Suppose that Plaintiff, injured by Owner's automobile driven by Driver, has no available evidence on the issue of agency except the adverse testimony of Owner and Driver, and therefore rests on a presumption of agency, ownership being proven or admitted. Suppose further that Owner, sole defendant, puts on his own testimony and that of Driver, both of whom deny agency. If this testimony banishes the presumption, you may have the anomaly that the trier must find non-agency, even though it thoroughly disbelieves the denial as self-serving perjury.<sup>97</sup> Such a result does indeed offend common sense and justice, and most courts reject it although it is hard to reconcile its rejection with the orthodox view.<sup>98</sup> Once a presumption comes into play the tendency is to send the matter to the jury unless the evidence to rebut the presumption leaves no reasonable room for the jury's function.

If the issue is sent to the jury, the question arises in this situation, as in the illustration involving the mailing of the letter, whether the persuasion burden is to be placed on plaintiff or defendant. And here again most courts will probably put it on plaintiff.<sup>99</sup>

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cluding *Res Ipsa Loquitur*), 37 VA. L. REV. 179, 224 (1951). But cf. *Western & Atl. R.R. v. Henderson*, 279 U.S. 639 (1929).

96. See *Delaware Coach Co. v. Savage*, 81 F. Supp. 293 (D. Del. 1948); *Fitzsimons v. Frey*, 153 Neb. 124, 43 N.W.2d 531 (1950); *King v. Aird*, 251 Ala. 613, 38 So. 2d 883 (1949).

97. See *McIver v. Schwartz*, 50 R.I. 68, 145 Atl. 101 (1929).

98. See, e.g., *Cebulak v. Lewis*, 320 Mich. 710, 32 N.W.2d 21 (1948); *Wyckoff v. Mutual Life Ins. Co.*, 173 Ore. 592, 147 P.2d 227 (1944); *O'Dea v. Amodeo*, 118 Conn. 58, 170 Atl. 486 (1934).

99. See *Jefferson Standard Life Ins. Co. v. Clemmer*, 79 F.2d 724, 729-31 (4th Cir. 1935); authorities cited note 98 *supra*; 9 WIGMORE § 2491.

The two alternative views set forth in the text are not the only possible ones, nor the only ones to attain some judicial support. Morgan, for example, lists the following: (1) The so-called orthodox view (see note 92 *supra* and accompanying text); (2) a presumption puts on the opponent the burden of persuading the jury "to believe so much of the evidence against the presumed fact as would justify a reasonable

Another, different problem has arisen in connection with presumptions. If a case goes to the jury, what if anything should be said to the jury about any presumptions which may have come into the case? The orthodox answer is unequivocal: nothing.<sup>100</sup> If a presumption has been met with sufficient evidence, the presumption has vanished and the issue should go to the jury without mention of it. Of course if the facts giving rise to the presumption also afford an inference, the jury may be told about the inference and if the word "presumption" is used so as to be clearly understood to mean only this permissible inference, choice of the wrong word may be harmless error.<sup>101</sup>

Even where a court gives a presumption continuing effect after evidence has been introduced to rebut it, there is no need to mention the presumption to the jury and it is probably only confusing to do so. If the persuasion burden is shifted, that is the only burden the instructions need mention. If it is not, but the jury may find *B* if they disbelieve opponent's evidence of non-*B*, then a simple direction to that effect is all that is needed. The only justification for telling the jury about the presumption would be a desire to implement the policy behind the presumption by inviting the jury to weigh it, in some vague manner not easy to understand or articulate, as they would a part of the evidence. But if policy demands additional force to the presumption, better ways than this can be devised for giving it.

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jury in finding against that fact." (3) It disappears when opponent puts in evidence upon which the trier's mind is in equipoise, if that evidence "is of the requisite quantity and quality to justify a reasonable jury in finding the nonexistence of the presumed fact." (4) It puts on opponent "the burden of persuading the jury that the existence of the presumed fact is so doubtful that the jury cannot determine whether it exists." (5) It puts on opponent "the burden of persuading the jury that the presumed fact does not exist." (6) In addition to having one of the foregoing effects, the presumption is to be weighed by the jury together with the evidence in the case. (7) It may simply allow an inference of *B* from *A* when the ordinary rules of proof would not allow it. (8) It may compel the finding of *B*, unconditionally, if *A* is found (the conclusive presumption). Morgan, *supra* note 85, at 60-62; A list of possibilities containing fewer refinements is found in *O'Dea v. Amodeo*, 118 Conn. 58, 170 A.2d 486 (1934). See generally MORGAN 81-86.

100. THAYER 337-339; 9 WIGMORE § 2491. See also Morgan, *supra* note 85.

101. See, e.g., *Mudrick v. Market St. Ry.*, 11 Cal. 2d 724, 81 P.2d 950 (1938).